

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROLANDO DIAZ)	
Claimant)	
VS.)	
)	
UNITED PARCEL SERVICE)	Docket Nos. 1,022,407
Respondent)	& 1,022,408
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the May 6, 2005 preliminary hearing Order of Administrative Law Judge Thomas Klein. Claimant was awarded benefits in the form of medical treatment, with respondent being ordered to provide a list of three physicians from which claimant could choose the authorized treating physician. Claimant was also awarded temporary total disability compensation if claimant "is taken off work."¹

ISSUES

1. Did claimant suffer accidental injury arising out of and in the course of his employment?
2. Was claimant's accidental injury a specific traumatic injury or a series of microtraumas extending over a period of time?
3. Did claimant provide timely notice of accident?
4. Did claimant provide timely written claim?
5. Was the May 5, 2005 preliminary hearing properly set and did the ALJ improperly consider the May 4, 2005 accident discussed by claimant at the preliminary hearing?

¹ Order at 2 (May 6, 2005).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the preliminary hearing, it was discussed by the parties that Docket No. 1,022,408 dealt with an injury related to claimant's hand and was not at issue at the time of preliminary hearing. While the Order from the ALJ carried Docket No. 1,022,408 and the appeal of the parties also carried that docket number, the injuries associated with that docket number are not in dispute and, therefore, respondent's appeal of that docket number is hereby dismissed.

With regard to Docket No. 1,022,407, claimant has alleged an accidental injury beginning December 24, 2003, and every working day thereafter. Claimant's alleged injury (as listed on the E-1 Application for Hearing filed April 4, 2005) is to the back of his head and the base of his neck and all other parts of the body affected.

As noted above, two of the disputed issues raised by respondent are whether claimant suffered accidental injury arising out of and in the course of his employment in the manner alleged and whether claimant provided timely notice of accident. Respondent appeared at the preliminary hearing with two representatives, Michael Kurran (the district safety manager for respondent) and Marvin Bass (respondent's supervisor). However, at the preliminary hearing, claimant discussed an additional supervisor, a part-time supervisor named Nathan (last name unknown), who allegedly was a witness to the accident and to whom claimant provided notice of the accident. During the testimony by claimant, respondent objected to testimony regarding any conversations claimant had with Nathan and requested that the court allow respondent additional time to take the deposition of Nathan, as "this is the first we've heard of a Nathan possibly being - - we brought everyone we could, we brought his supervisor, we brought his safety manager to discuss this, this is the first we've heard of someone named Nathan."² That request was denied by the ALJ.

The ALJ went on to award benefits to claimant, impliedly finding in the preliminary hearing Order that respondent's defenses of adequate notice and whether claimant suffered accidental injury arising out of and in the course of his employment were neglected.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.³ Additionally, the Workers Compensation Act contemplates that all parties be given reasonable opportunity to be heard.⁴

² P.H. Trans. (May 5, 2005) at 11.

³ K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

⁴ K.A.R. 51-3-8(d).

And finally, K.S.A. 44-534a controls the procedure by which the parties may bring before an administrative law judge disputes regarding medical treatment or the payment of temporary total disability compensation. The procedure is fairly well set out, and K.S.A. 44-534a states in part as follows:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues.⁵

Respondent's defense in this matter is multifactorial and includes issues regarding whether claimant suffered accidental injury, whether the accidental injury arose out of and in the course of employment and whether adequate and timely notice was provided. The name of the part-time supervisor, Nathan, was not presented to respondent before the preliminary hearing. Obviously, Nathan's involvement in allegedly witnessing the accident and, therefore, being provided timely notice could be crucial in this dispute. The Workers Compensation Board (Board) finds the ALJ's refusal to give respondent additional time to depose Nathan is error on the ALJ's part and is reversed. The Board finds the ALJ's denial of respondent's request has denied respondent the opportunity to present evidence, including testimony, on the disputed issues of whether claimant suffered accidental injury arising out of and in the course of employment and timely and adequate notice. The Board, therefore, remands this matter back to the ALJ for further proceedings,⁶ including respondent's entitlement to take the deposition of the part-time supervisor, Nathan.

The Workers Compensation Board does not retain jurisdiction over this matter and any additional appeals taken from any future determinations by the ALJ must follow the appropriate procedures under the Workers Compensation Act of the state of Kansas.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the above matter shall be remanded to Administrative Law Judge Thomas Klein for further proceedings consistent with the above Order.

IT IS SO ORDERED.

⁵ K.S.A. 44-534a(a)(2).

⁶ K.S.A. 2004 Supp. 44-551(b)(1).

Dated this ____ day of August 2005.

BOARD MEMBER

c: Stephen J. Jones, Attorney for Claimant
Robert J. Wonnell, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director